KOID HONG KEAT

v.

RHINA BHAR

HIGH COURT MALAYA, PULAU PINANG
WAN ADNAN J
[CIVIL SUIT 23-97-87]
2 JUNE 1989

CONTRACT: *Section 24 of the Contracts Act - Agreement amounts to touting - Whether touting is contrary to public policy - Whether infringement of a bye-law contrary to public policy - Rule 52 of the Legal Profession (Practice & Etiquette) rules.*

This is an application by the defendant, who is an advocate and solicitor, to strike out the plaintiffs action under O. 18 r. 9 of the Rules of the High Court 1980. The defendant agreed orally to pay the plaintiff ten per cent (10%) of the fees collected by the defendant upon the conclusion of each case referred to the defendant for consultation, legal proceedings or otherwise. The defendant alleged that the oral agreement is unenforceable as being contrary to public policy.

Held:

[1] Before an act or agreement can be regarded as being contrary to public policy pursuant to s. 24(e) of the Contracts Act 1950, it must be shown to the Court that such act or agreement has a tendency to be injurious to the public welfare.

[2] The Legal Profession (Practice and Etiquette) Rules 1978 are rules made by a body, namely, the Bar council. The Rules are not statutory provisions.

[3] Therefore, touting is an act which infringes a rule under the Legal Profession (Practice and Etiquette) Rules 1978. These Rules do not reflect the public opinion, and as such, infringement of the Rules is not injurious to public welfare.

Cases referred to:
Re A Solicitor [1945] 1 All ER 445
In the matter of Phool Din & Ors. [1952] AIR Allahabad 491
Nagle v. Feilden [1966] 2 WLR 1027

Legislation referred to:
Contracts Act 1950 s. 24(e)
Legal Profession Act 1976, s. 77
Legal Profession (Practice and Etiquette) Rules 1978, rr. 51, 52
Legal Practioners Act 1879, s. 36

Other source referred to:
Indian Contract Act, Pollock and Mulla, 10th Edn., p. 260

For the plaintiff - Gan Teik Chee; M/s. Gan Teik Chee & Co.
For the defendant - R.J. Manecksha

JUDGMENT

Wan Adnan J:

This is an application by the defendant who is an advocate and solicitor that the plaintiff's action be struck out pursuant to O. 18 r. 19 on the ground that it discloses no cause of action.

The plaintiff in para. 3 of the statement of claim says:

> The plaintiff had some time in 1980 entered into an agreement orally with the defendant whereby it was agreed that the plaintiff would be paid ten per cent (10%) of the fees collected by the defendant upon the conclusion of each case referred to the defendant for consultation. Legal proceedings or otherwise.

The defendant says that the alleged oral agreement amounts to touting and since touting is contrary to public policy the alleged agreement is unenforceable under s. 24 of the Contracts Act 1950 which states as follows:

> The consideration or object of an agreement is lawful, unless:
>
> (a) it is forbidden by a law;
>
> (b)
>
> (c)
>
> (d)
>
> (e) the Court regards it as immoral, or opposed to public policy.
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

I agree that on the pleadings the plaintiff is a tout. But, is touting contrary to public policy?

The *Indian Contract Act* by Pollock and Mulla (10th Edn.) says at p. 260:

> Lord Brougham defines public policy as the principle which declares that no man can lawfully do that which has a tendency to be injurious to the public welfare. Public policy comprehends only the protection and promotion of public welfare.

Counsel for the defendant referred me to r. 51 and r. 52 of the Legal Profession (Practice & Etiquette) Rules 1978. Rule 51 states as follows:

> An advocate and solicitor shall not do or cause or allow to be done, anything for the purpose of touting directly or indirectly, or which is calculated to suggest that it is done for that purpose.

Rule 52 states as follows:

> It is unprofessional and improper conduct:
>
> (a) for an advocate and solicitor to divide or agree to divide either costs received or the profits of his business with any unqualified person;
>
> (b) for an advocate and solicitor to pay, give, agree to pay or agree to give any commission, gratuity or valuable consideration to any unqualified person to procure or influence or for having procured or influenced any legal business and whether such payment, gift or agreement be made under pretext of services rendered or otherwise, but this rule does not prohibit the payment of ordinary bonuses to staff;
>
> (c) for an advocate and solicitor to accept or agree to accept less than the scale fees laid down by law in respect of non-contentious business carried out by him except for some special reason where no charge at all is made.

Counsel says that since the rules expressly prohibit touting and division of costs and profits, any agreement in relation thereto are contrary to public policy. I was referred to the judgment of Scott LJ in *Re A Solicitor* [1945] 1 All ER 445 particularly to the following passage:

"Touting" for clients is, like advertising, fundamentally inconsistent with the interest of the public and with the honour of the profession. The function of a solicitor is to advise or negotiate or fight for a client, but only if retained. The client may seek him, but he must not seek the client. And this rule of conduct must be made a reality, and not evaded by the subterfuge of getting some laymen to do the touting for him. To ensure the success of this fundamental policy of the profession, in the case of accident claims, where in practice the danger is greatest, a veto is laid down in r. 4(b) against accepting clients who have been brought to him by lay touts.

This was an appeal against the order of the disciplinary committee of the Law Society. I was also referred to the case of *In the matter of Phool Din & Ors.* [1952] AIR Allahabad 491. This was a proceeding under s. 36 of the Legal Practitioners Act 1879. Clause (6) of the section provides that if a person acts as a tout whilst his name is included in any list of touts framed and published ... he shall be punishable with imprisonment which may extend to three months. The Court had this to say:

[15] Legal profession is one of the honourable professions. Every litigant should be at liberty to find out for himself as to which lawyer will render him the best service. If he engages a lawyer through a tout, the tout is likely to take him to a lawyer who gives him the largest remuneration. A tout would not be concerned with affording the best service to a litigant. The litigant may thus be deprived of the best service. The system of toutism is bound to corrupt the legal profession. A most talented lawyer may not be able to get work because he does not stoop down to accept an engagement through a tout; but a lawyer who has no scruples to accept employment through a tout may have large work, because he gives a share of his remuneration to the tout. The administration of justice itself may be affected by permitting toutism, as the Courts may not have the advantage of the service of the best lawyers before them. We have no doubt in our mind that it is not in public interest to permit toutism. The provisions in the Legal Practitioners Act in respect of tout are saved by cl. (6) of Art 19.

[16] There is no comparison between the profession of a broker and that of a tout. A broker is an intermediary between a seller and a purchaser. The purchaser sees the commodity he buys or gives the particulars of the kind of commodity he proposes to buy. There is little likelihood of his deception. In the very nature of things such is not the position in regard to employment of a lawyer by a litigant. The institution of brokers has long been recognized by the society. The society has not shown its abhorrence of it by prohibiting it. *On the other hand, toutism is prohibited by the Legal Practitioners Act. The society abhors it. Laws are reflections of the public opinion. The provisions relating to touts in the law show the abhorrence of the society towards this profession.* Touts and lawyers who accept engagements through touts are looked down upon by the society.' (Emphasis is added)

The Legal Profession (Practice and Etiquette) Rules 1978 were made by the Bar Council pursuant to s. 77 of the Legal Profession Act 1976 which states as follows:

77. Power to make rules regulating practice, etc.

(1) Without prejudice to any other power to make rules provided under this Act, the Bar Council may, with the approval of the Attorney General make rules for regulating the professional practice, etiquette, conduct and discipline of advocates and solicitors.

(2) Any rules made pursuant to this section shall not come into operation until they have been published in the *Gazette*.

(3) Any advocate and solicitor who fails to comply with any rules made under this section may be liable to disciplinary proceedings.

(4) The Attorney General may, by order published in the *Gazette*, make such modifications as he deems necessary to any rules made and published under this section before the coming into operation of this subsection.

In my view before the Court can regard touting as opposed to public policy under s. 24(e) of the Contracts Act 1950 there must be shown to the Court that touting has a tendency to be injurious to the public welfare. The Legal Profession (Practice and Etiquette) Rules 1978 were made by the Bar Council "for regulating the professional practice, etiquette, conduct and discipline of advocates and solicitors." They do not apply to other people. The rules were not made by Parliament. They therefore cannot be taken to reflect public opinion. Has public opinion been expressed in this matter? I have not been informed of and I have not come across any expression of opinion from the public either for or against touting. The society has not shown its abhorrence to touting. If the prohibitions in rr. 51 and 52 are statutory provisions I will have no hesitation to hold that touting is injurious to the public welfare because "laws are reflections of the public opinion." (*In the matter of Phoon Din & Ors. supra*)

The case of *Re A Solicitor supra* was a disciplinary proceeding. It is not directly relevant to the present case. In any event it is an old case.

> The law relating to public policy must change with the passage of time, it cannot remain immutable *Nagle v. Feilden* [1966] 1 WLR 1027.

Further what is injurious to public welfare in England may not necessarily be so in Malaysia and vice versa. What is and what is not injurious to public welfare in Malaysia must be decided in the Malaysian context.

In the present case on the affidavit evidence alone I cannot decide whether or not touting is injurious to public welfare. The Court should not in my view just impose its own opinion on the matter. The Court should be sensitive to the feelings of the general public. Before making its decision the Court should be made aware of such feelings.

For the above reasons I dismissed the application with costs.

Also found at [1989] 2 CLJ 1219